2013 IL App (1st) 113586-U

SECOND DIVISION
September 10, 2013

No. 1-11-3586

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	Nos. YT 198025
	)	YT 198026
	)	YT 198027
	)	
JOHN JONES,	)	Honorable
	)	Henry Singer,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Quinn and Justice Harris concurred in the judgment.

O R D E R

¶ 1 *Held*: Where trial court's inquiries during jury polling afforded juror a chance to explain his initial response and the juror's ultimate reply reflected agreement with the guilty verdict, the court reasonably concluded the juror freely assented to the outcome; the trial court's judgment was affirmed.

¶ 2 Following a jury trial, defendant John Jones was convicted of driving under the influence (DUI) stemming from a 2010 traffic stop in Skokie. Defendant was sentenced to 18 months of conditional discharge. On appeal, defendant contends that when the trial court polled the jury, the court's exchange with a juror constituted reversible error because the court did not allow the juror to explain his initial response and improperly influenced the juror by questioning him about his decision. We affirm.

¶ 3 At trial, a Skokie police officer testified he responded to the scene of a car accident and detected a "strong odor of alcoholic beverage" on defendant's breath and noted that defendant's eyes were "bloodshot and watery." In response to the officer's question, defendant said he was returning from a family barbecue and had consumed "a couple of beers." Defendant failed the sobriety tests administered by the officer and was arrested for DUI. The State played for the jury a videotape of defendant's sobriety tests. For the defense, a friend of defendant testified that he was at the barbecue with defendant and did not think defendant was impaired when defendant left the event.

¶ 4 After deliberating, the jury returned to the courtroom, and the foreperson read the jury's verdict. The court told the jurors it was "going to ask each and every one of you whether or not that verdict was your verdict and if it's still your verdict." After polling four jurors, the following exchange occurred:

"THE COURT: Nicholas Mack, was that your verdict and is this now your verdict?

JUROR MACK: No, but yes and no.

THE COURT: Well, your answer can't be yes and no. Is that your verdict now?

JUROR MACK: Yes.

THE COURT: Okay. And was that your verdict when you signed the verdict paper?

JUROR MACK: No.

THE COURT: Okay, when you signed the verdict, that was not your verdict, a finding of guilty?

JUROR MACK: According – excuse me, according to the law, yes. But, it was other things that I felt that made him not guilty.

THE COURT: Okay. So let me ask you that question again: Was that your verdict and is this now your verdict that he is guilty?

JUROR MACK: Yes."

¶ 5 Defense counsel asserted in a post-trial motion, *inter alia*, that the jury's verdict was not unanimous due to the response of juror Mack. The trial court denied defendant's motion for a new trial.

¶ 6 On appeal, defendant contends his conviction should be reversed and this case remanded for a new trial because the equivocal responses of juror Mack cast doubt on the unanimity of the guilty verdict. Defendant argues the court's polling method was erroneous and the court's suggestive questioning did not allow the juror to explain his initial response.

¶ 7 The purpose of polling a jury is to determine that the verdict accurately reflects each juror's vote and that the vote was not the result of coercion. *People v. Kliner*, 185 Ill. 2d 81, 166 (1998); *People v. Kellogg*, 77 Ill. 2d 524, 528 (1979). "Through a jury poll, jurors may freely assent or dissent to the verdict without the fear, errors, or coercive influences that may have prevailed in the jury's private collective deliberations." *People v. Wheat*, 383 Ill. App. 3d 234, 237 (2008), citing *People v. Banks*, 344 Ill. App. 3d 590, 597 (2003); see also *Kellogg*, 77 Ill. 2d at 528.

¶ 8 Polling should be done in a manner that elicits an unequivocal response from each juror. *People v. Beasley*, 384 Ill. App. 3d 1039, 1048-49 (2008) (citing *Kellogg*). While the trial court should not turn the polling process into an opportunity for further deliberations, the court also must not hinder a juror's expression of dissent. *People v. Cabrera*, 116 Ill. 2d 474, 490 (1987); *Beasley*, 384 Ill. App. 3d at 1049. If a juror indicates some hesitancy or ambivalence in his or her answer, then the trial judge must determine the juror's present intent by affording the juror the opportunity to make an unambiguous reply as to his or her present state of mind. *Kliner*, 185 Ill. 2d at 166-67; *Kellogg*, 77 Ill. 2d at 528.

¶ 9 For example, in *Kellogg*, a juror asked during the poll, "Can I change my vote?" in response to which the court twice repeated the query, "Was this then and is this now your verdict?" After remaining silent when the question was posed, the juror acquiesced to the court's query the second time it was made. *Id*. at 527. On appeal, the supreme court affirmed the appellate court's conclusion that the record did not reflect the verdict was unanimous and that the trial court did not sufficiently determine the juror's present intent. *Id*. at 530. If the court determines a juror dissents from the verdict, the proper remedy is for the trial court, on its own motion if necessary, to either direct the jury to retire for further deliberations or to discharge the jury. *Id.* at 528.

¶ 10 The trial judge, in determining whether a juror has freely assented to the verdict, hears the response and additionally observes the juror's demeanor and tone of voice during the course of polling the jury. *Cabrera*, 116 Ill. 2d at 490. Accordingly, the trial court's determination as to the voluntariness of a juror's assent to a verdict will not be set aside unless the trial court's conclusion is clearly unreasonable. *Kliner*, 185 Ill. 2d at 167; *People v. McDonald*, 168 Ill. 2d 420, 463 (1995).

¶ 11 In contrast to the deferential standard set out in *Kliner*, defendant contends that because his argument on appeal is that the court failed to follow the requirements stated in *Kellogg*, the issue presented is one of law, and this court therefore should apply *de novo* review. Defendant does not cite any cases that have followed that reasoning. Rather, Illinois courts have consistently held that the manner in which jury polls are conducted are within the discretion of the trial court and whether a juror had freely assented to a verdict in such a poll is a question of fact for the trial court to decide. *People v. Herron*, 30 Ill. App. 3d 788, 791-92 (1975); see also, *e.g.*, *People v. Wheat*, 383 Ill. App. 3d 234, 238 (2008); *People v. Bennett*, 154 Ill. App. 3d 469, 477-78 (1987); *People v. Chandler*, 88 Ill. App. 3d 644, 650 (1980).

¶ 12 To review the colloquy in this case, the juror responded "No, but yes and no," when the court made its initial inquiry. The court said his "answer can't be yes and no" and asked again

whether the guilty finding was his "verdict now," the juror responded yes. The court asked the juror if that was his "verdict when [he] signed the verdict paper," and the juror responded no. When the court asked him to explain that, the juror stated that "according to the law," that was his verdict, but he felt defendant was not guilty based on "other things." The juror then responded affirmatively when the court again asked, "Was that your verdict and is this now your verdict that he is guilty?"

¶ 13 A more detailed review of that exchange indicates the court followed the directives of *Kellogg* and made the reasonable determination that the juror voluntarily assented to the verdict. When the juror responded ambivalently to the court's initial inquiry, the court was required to determine his present intent. See *Kliner*, 185 Ill. 2d at 166-67; *Kellogg*, 77 Ill. 2d at 528. The court did so by asking if the guilty verdict represented his verdict "now." The juror indicated it did. Thus, the court ascertained the juror's present intention.

¶ 14 The court then asked the juror if he intended a guilty verdict in signing the verdict form, and the juror responded no and explained that although he had found defendant to be guilty "according to the law," he felt unsure about that verdict based on "other things." The juror thereby expressed the equivocation he felt in the jury room during deliberations; however, the juror's answer established his agreement that defendant was guilty under the law, and the juror then affirmed that determination in answering the court's final question. The juror's responses indicated that the jury verdict reflected his intentions.

¶ 15 Defendant argues the juror was given little opportunity to explain his "yes and no" response and the court should have stopped its coercive inquiry after the juror stated there were "other things" that made defendant "not guilty." He contends a verdict cannot stand "if the trial judge's interrogation precludes the opportunity to dissent," citing *Kellogg*, 77 Ill. 2d at 529. However, the complete colloquy indicates the juror was given the opportunity to dissent and ultimately stated that the guilty verdict reflected his vote.

¶ 16 Defendant relies on several decisions in which this court has held a juror was not provided an opportunity to express his or her feelings about the verdict and has remanded for a new trial because the juror had not freely assented. He cites *Beasley*, 384 Ill. App. 3d at 1048-49, in which the juror in question was asked if the guilty verdict was "your verdict" and responded, "Um – I have to say, yes, I guess," and the court proceeded to the next juror over defense counsel's objection to the subject juror's response. On appeal, this court concluded the juror in *Beasley* "was never given the *opportunity* to restate his position more clearly." *Id*. at 1049. Defendant also cites *Bennett*, 154 Ill. App. 3d at 473, in which this court found the trial court failed to fully examine a juror who twice said she was "not sure" about the verdict, and the court made no further inquiries for clarification of her remarks.

¶ 17 Here, in contrast to *Beasley* and *Bennett*, the court immediately questioned the juror about his "yes and no" response and elicited an explanation. Using the same distinction, we find defendant's reliance on *People ex rel Paul v. Harvey*, 9 Ill. App. 3d 209, 210-11 (1972), to be misplaced, where the juror responded, "Well, it wasn't exactly, no" when asked about the verdict in a paternity action and the court made no further inquiry. In the case at bar, the juror was allowed to explain his initial equivocal answer, and the court determined the juror's final answer supported the verdict.

¶ 18 We find the cases cited by the State to be more analogous to the instant facts. The State relies on *Herron*, in which 11 jurors responded affirmatively to the inquiry, "Was this and is this now your verdict?" *Herron*, 30 Ill. App. 3d at 789. Following those responses, the jury foreman replied, "It wasn't but it is." On appeal, this court rejected the defendant's assertion that the foreman's response demonstrated a lack of voluntary assert to the verdict, as determined by the trial judge, because the foreman indicated he agreed with the ultimate outcome. *Id*. at 791-92.

¶ 19 Similarly, in *People v. Gayfield*, 261 Ill. App. 3d 379, 391-92 (1994), the juror responded negatively to the court's initial inquiry as to whether he agreed with the verdict. When the court replied, "Pardon me?" the juror stated, "It wasn't, but it is now." *Id*. at 392. The juror responded

affirmatively when the court repeated its original question. *Id*. This court concluded the trial judge afforded the juror an opportunity to state his present intent. *Id.*

¶ 20 Pursuant to the rule established in *Kliner* and *Kellogg*, the juror in this case was given the chance "to make an unambiguous reply" as to his present state of mind. *Kliner*, 185 Ill. 2d at 166-67; *Kellogg*, 77 Ill. 2d at 528. Because the juror replied that he found defendant guilty "according to the law" and then affirmed that the guilty verdict represented his vote, the trial court's determination that the juror voluntarily assented to the verdict was reasonable.

¶ 21 Accordingly, the judgment of the trial court is affirmed.

¶ 22 Affirmed.